COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

D.T.C. 20-4 May 26, 2021

Pole Attachment Complaint of Town of Shutesbury v. Verizon New England, Inc., Massachusetts Electric Company d/b/a National Grid, and Western Massachusetts Electric Company, a/k/a Eversource.

ORDER

In this Order, the Department of Telecommunications and Cable ("Department") denies the Petition filed by the Town of Shutesbury ("Town") and the Town's municipal light plant, the Shutesbury Municipal Light Plant ("Light Plant"), (together, "Complainant") against Verizon New England, Inc. ("Verizon"), the Massachusetts Electric Company d/b/a National Grid ("National Grid"), and the Western Massachusetts Electric Company, a/k/a Eversource ("Eversource") (together, "Respondents") challenging one term and condition of the pole attachment agreements between the Complainant and the Respondents.

I. Background

In 2017 and 2018, Complainant executed a pole attachment agreement with each of the Respondents. *See* Petition to Remove Surety Bond Requirement for Utility License Agreements for Municipalities, D.T.C. 20-4 (filed December 1, 2020) ("Complaint") at Appendix (individually, "Eversource Contract," "National Grid Contract," and "Verizon Contract," and collectively, "Pole Attachment Agreements"). The Pole Attachment Agreements enabled the Complainant to construct a municipal broadband system utilizing fiber strung along 42 miles of public roads in the Town, attached to approximately 1,500 utility poles owned by Respondents. Complaint at 1. All such poles are jointly owned, either by Verizon and National Grid or by Verizon and Eversource. *Id.*

On December 1, 2020,[1] pursuant to G.L. c. 166, § 25A and 220 C.M.R. § 45.04, the Complainant filed the Complaint with the Department. On January 26, 2021, the Department of Public Utilities ("DPU") exercised its right to intervene as a full party pursuant to ¶ 9 of the Memorandum of Agreement on Pole Attachment Jurisdiction executed on October 14, 2008, between the Department and the DPU and most recently renewed on February 3, 2017. Dep't of Pub. Utils., Notice of Intervention, D.T.C. 20-4 (Jan. 26, 2021). The DPU submitted comments to the Department on May 19, 2021 ("DPU Comments"). On January 27, 2021, the Department issued a Notice publicizing the opportunity to intervene in this proceeding. The Department distributed the Notice to interested persons and caused the Notice to be published in the *Greenfield Recorder* on February 1, 2021. 220 C.M.R. § 45.06(2) (affording the Department wide procedural discretion in complaint proceedings in which a formal hearing has been

[1] Complainant first filed a procedurally deficient petition with the Department on October 30, 2020, and largely corrected such defects in the Complaint filed on December 1, 2020. The Department accepts that Complaint as filed.

waived). Other than the DPU's intervention as of right, the Department did not receive any petitions to intervene. Massachusetts State Senator Joanne Comerford and State Representative Natalie Blais filed a letter in support of the Complaint. The Department did not receive any other public comments. The Complaint does not contain a request for a hearing, and thus the Complainant waived its right to a hearing in this proceeding. 220 C.M.R. § 45.04(2)(i), 45.06(2); *see also* G.L. c. 30A, § 10.[2] On January 19, 2021, National Grid filed a response to the Complaint with the Department ("National Grid Response"), Verizon filed a response to the Complaint with the Department ("Verizon Response"), and Eversource filed a response to the Complaint with the Department ("Eversource Response"). On February 7, 2021, the Complainant filed a Reply to the Respondents ("Reply").

II. Jurisdiction of the Department

Federal law grants the Federal Communications Commission ("FCC") the authority to regulate the rates, terms, and conditions for pole attachments except in those states where the state has certified to the FCC that the state regulates such rates, terms, and conditions. 47 U.S.C. § 224(b), (c). Massachusetts regulates pole attachment rates, terms, and conditions and has certified this to the FCC. *See* G.L. c. 166, § 25A; *States that have Certified that they Regulate Pole Attachments*, WC Docket No. 20-302, Public Notice (FCC Mar. 19, 2020).

The Department shall determine and enforce reasonable rates, terms, and conditions for the use of utility poles for attachments when the utility and a potential attacher disagree on such rates, terms, or conditions. G.L. c. 166, § 25A. If the Department determines that a rate, term, or condition is not just and reasonable, the Department may prescribe a reasonable rate, term, or

[2] In their Responses, each of the Respondents requested a hearing, pursuant to 220 C.M.R. § 45.05(3), if and only if the Department did not deny the Petition. This Order's denial of the Petition renders these requests for a hearing moot.

condition and may: (1) terminate the unreasonable rate, term, or condition, and (2) substitute in the attachment agreement the reasonable rate, term, or condition established by the Department, or (3) order other relief the Department finds appropriate. 220 C.M.R. § 45.07.

III. Positions of the Parties

a. Complainant

Complainant challenges the terms and conditions contained in each of the Pole Attachment Agreements that require it to post a surety bond as not just and reasonable. Complaint at 1, 3. Complainant asks the Department: 1) to terminate each of the terms and conditions in the Pole Attachment Agreements that require Complainant to maintain a surety bond, and 2) to "waive" similar requirements for all municipal attachers who are parties to pole attachment agreements. *Id.* at 2, 3.

To support the challenge to these terms and conditions, Complainant makes the following arguments, among others. First, Complainant argues that municipal attachers are different from for-profit, "commercial" attachers in several ways. *Id.* at 2. Complainant contends that these differences make a surety bond requirement not just and reasonable for a municipal attacher, even though such a requirement may be just and reasonable when required of a commercial attacher. *Id.* Second, Complainant makes several arguments concerning the reasonableness of the specific surety bond requirements and attachments at issue in this proceeding. *Id.* at 2, 3.

i. Claim That Municipal Attachers Are Different From Commercial Attachers

Complainant begins by noting differences between municipal and commercial attachers, which it claims make surety bond requirements not just and reasonable when applied to municipal attachers. First, Complainant claims that small municipalities are unable to negotiate the terms and conditions of pole attachment agreements with pole owners. Complaint at 2.

Second, Complainant argues that there is a unique "implicit spirit of mutual benefit" between pole owners and municipal attachers that should obviate the need for pole owners to require surety bonds of municipal attachers. *Id.* Third, Complainant argues that commercial attachers "are more transient and more subject to volatile market and technology forces" than are municipalities "which are more stable entities." *Id.* Finally, Complainant argues that pole owners would be better positioned in the event of a municipal attacher's bankruptcy than they would be if faced with the bankruptcy of a commercial attacher. *Id.*

In its Reply, Complainant adds that municipal networks are "backed by the Town's finances and tax base." Reply at 2. Complainant also notes that municipalities' fiscal positions are known in advance, thanks to statutorily required state audits, and that municipal finances are governed by state oversight. *Id.* In addition, while acknowledging "towns do go bankrupt," Complainant argues that if this were to occur, pole owners would still not need the protection a surety bond affords for multiple reasons. *Id.* at 2, 3. Finally, Complainant claims that the Respondents failed to provide historical evidence of the necessity of the required surety bonds. *Id.* at 2, 4.

ii. Reasonableness of the Surety Bond Requirements in the Pole Attachment Agreements

Next, Complainant lists additional reasons why it believes the surety bond requirements in the Pole Attachment Agreements are not just and reasonable. First, Complainant argues that Respondents would not remove Complainant's attachments if Complainant abandoned them, thereby obviating the need for Respondents to be protected by a surety bond from the risk that Respondents would be forced to incur the cost of removing this equipment. *Id.* at 3, 4, Sephton Aff.; Complaint at 2, 3. Complainant supports this claim by arguing that the "support cables" Complainant has attached to Respondents' poles would protect Respondents' cables from falling

trees and branches and would also strengthen and stabilize Respondents' "pole system" against wind and falling trees. Reply at 3, 4, Sephton Aff.; Complaint at 2, 3. Second, Complainant argues that two of the Respondents, Verizon and National Grid, have current attachment agreements with the University of Massachusetts Amherst that do not contain a surety bond requirement, thus identifying "precedent for a waiver/exceptions to the surety bond requirement for certain entities." Complaint at 3. Finally, Complainant argues that each Pole Attachment Agreement requires a surety bond equal to the Respondents' individual costs of removing the Complainant's entire network, but notes that all of the poles to which the Complainant has attached are jointly owned, resulting in a claimed over-indemnification. Reply at 4, 5.

b. Verizon

Verizon argues that the surety bond requirement contained in the Verizon Contract is common, applied to all attachers, and just and reasonable. Verizon Response at 1. As evidence that such bonding requirements are common, Verizon notes that municipalities routinely require utilities to obtain bonds before working in the ROW and points to G.L. c. 166A, § 5(k)'s requirement that cable operators submit a bond prior to construction. *Id.* at 5.

In response to Complainant's argument that municipal attachers are less likely to leave pole owners with uncompensated costs, Verizon notes that the size of this risk is not only correlated with the likelihood that an attaching entity will cease to exist during the term of the pole attachment agreement, but with the likelihood that, while the attaching entity exists, it refuses or is unable to meet its obligations. *Id.* at 6. In fact, Verizon argues that municipal attachers may be more, not less, likely than commercial attachers to fail to meet their pole-attachment obligations because municipal attachers are less experienced in the internet service

provider ("ISP") business and more likely to run out of capital with which to meet their obligations. *Id.* at 6, 7, Appendix.

Verizon refutes Complainant's argument that pole owners could more easily collect debts from municipal attachers than from commercial attachers by noting the pole owners and other creditors cannot force a municipal attacher into bankruptcy proceedings in Massachusetts in order to collect debts, as they could commercial attachers, because Massachusetts law does not authorize municipalities to file for bankruptcy. *Id.* at 7-8. Municipal receivership instead requires a special act of the Massachusetts Legislature, Verizon argues. *Id.* at 7. Finally, Verizon notes that, even if pole owners could collect debts owed pursuant to pole attachment agreements more easily from a municipal attacher, Verizon would nevertheless face collection burdens and that the "key purpose" of a bond is to provide a means of obtaining payment short of litigation or other lengthy proceedings. *Id.* at 8.

In response to the Complainant's more specific claims, Verizon first denies there is a special relationship between utilities and municipalities in Massachusetts. Verizon argues that Massachusetts municipalities do not charge utilities for placing poles in the ROW or require that utilities maintain surety bonds related to such poles not because of a "special relationship," but because municipalities lack the statutory authority to do either. *Id.* at 4. In addition, Verizon points out that utilities offer municipalities space on utility poles only for fire and police signal systems, not to allow municipal light plants to offer electricity or telecommunications services to consumers on a commercial basis. *Id.* at 4, 5. Verizon concludes that any "spirit of mutual benefit" between utilities and the municipalities in which they operate does not apply when municipalities become competitors to those same utilities. *Id.* at 2, 4. Finally, Verizon refutes

the claim that Complainant's abandoned infrastructure may be of some benefit to Respondents. *Id.* at 8-9

Verizon also sets forth procedural arguments, first claiming that Complainant lacks standing to ask the Department to prohibit pole owners from requiring surety bonds from all municipal attachers. *Id.* at 3. Verizon argues that 220 C.M.R. 45.00 grants Complainant only the right to challenge the reasonableness of the surety bond requirement contained in a pole attachment agreement to which Complainant itself is a party. *Id.* Verizon also challenges Complainant's compliance with the affidavit requirements contained in 220 C.M.R. § 45.04(4). *Id.*

c. National Grid

National Grid rejects Complainant's claim that applying a surety bond requirement to Complainant and other municipal attachers is not just and reasonable, citing the risks of municipal bankruptcies, however infrequent. National Grid Response at 2. National Grid also notes that surety bond requirements are a standard requirement for construction work. *Id.* National Grid claims that allowing municipal attachers to avoid providing surety would expose its customers to potential loss which it claims would violate the cost-causation principle that pole attaching entities must cover any incremental costs created by their attachments. *Id.* Finally, National Grid claims that exempting only municipal attachers from the surety bond requirement would violate its obligation as a pole owner to provide nondiscriminatory access to its poles. *Id.* at 1 (citing G.L. c. 166, § 25A; 220 C.M.R. §§ 45.01, 45.03).

d. Eversource

Eversource also notes that surety bonds are routinely required in the construction field and that its legal obligation to provide nondiscriminatory access to its poles requires Eversource

to require a surety bond of all attachers. Eversource Response at 1. Eversource disputes Complainant's claim that applying a surety bond requirement to municipal attachers is unjust and unreasonable because municipalities pose little or no risk to pole owners of non-performance. *Id.* at 2. First, Eversource argues that municipal ISPs are no more "stable" than commercial ISPs, as some commercial attachers have higher credit ratings than do some municipalities. *Id.* Next, Eversource argues that there is no legal guarantee that municipal attachers in Massachusetts would honor their obligations should they encounter financial difficulties. *Id.* Eversource also disputes Complainant's contention that the pole owners would not remove Complainant's attachments in the event of default, by noting that, regardless of these attachments' effect on Eversource's infrastructure in the short term, Eversource might eventually have to remove Complainant's equipment because all communications networks eventually become obsolete. *Id.* Finally, Eversource argues that granting Complainant's request to eliminate the surety bond requirement only for municipal ISPs, but not for commercial ISPs, would violate Eversource's legal obligation to provide nondiscriminatory access to its poles to telecommunications providers. *Id.*

e. DPU

DPU notes that the surety bond requirement does not have a significant impact on the rates Complainant charges its broadband customers. DPU Comments at 6. DPU also notes that, while the risk to Respondents of not requiring Complainant to maintain a surety bond is relatively low given the number of poles to which Complainant has attached, granting the Complaint would set an undesirable precedent because of its potential impact on utility customers. *Id.* at 6, 7. DPU notes that the assessment of the risk posed by Complainant's default of its Pole Attachment Agreement obligations are best left to Respondents to determine. *Id.* at 7.

DPU concludes that, "generally speaking, the surety bond requirement is not unreasonable," but urges the Department to examine whether the amounts of the surety bonds are excessive. *Id.*

IV. Analysis

Complainant challenges the terms and conditions contained in each of the Pole Attachment Agreements that require Complainant to post a surety bond as not just and reasonable and requests that the Department terminate these terms and conditions. Complaint at 1, 3. The Department is willing to intervene in voluntarily negotiated pole attachment agreements only "sparing[ly]." *A-R Cable Servs., Inc. v. Mass. Elec. Co.*, D.T.E. 98-52, *Order* (Nov. 6, 1998) at 5 n.7. Complainant must specify the information upon which it relies to justify its claims, and the evidence presented must be sufficient to show that the terms and conditions it challenges are not just and reasonable. *See* 220 C.M.R. § 45.04(2)(c); *Cablevision*, D.P.U./D.T.E. 97-82, *Order* (Apr. 15, 1998) at 51 (finding insufficient evidence to show that the pole attachment agreement terms and conditions challenged pursuant to 220 C.M.R. § 45.04 are unreasonable). The Department finds that Complainant has failed to present evidence sufficient to substantiate Complainant's claim that the challenged terms and conditions in any of the Pole Attachment Agreements are not just and reasonable.[3]

a. Claim that Requiring Complainant to Maintain a Surety Bond Is Not Just and Reasonable

The Department agrees with Respondents that the pervasiveness of surety bond requirements in pole attachment arrangements and many similar contractual relationships involving the construction and operation of personal property on another party's real property,

[3] Complainant asks the Department to "waive" any terms and conditions requiring the attacher to maintain a surety bond in any pole attachment agreements where the attaching party is a municipality. The Department agrees with Verizon that Complainant lacks standing to make this request on behalf of other municipal attachers. *See* Verizon Response at 3; *cf.* 220 C.M.R. § 45.04(1) (allowing more than one complainant to file a joint complaint). The Department declines to consider this request.

weighs against finding that such terms and conditions of the Pole Attachment Agreements are not just and reasonable.

Although Massachusetts possesses and exercises the authority to regulate pole attachment rates, terms, and conditions at the state level, because the majority of both G.L. c. 166, § 25A and 220 C.M.R. 45.00 mirror provisions in the federal statutes and regulations governing pole attachments, the Department finds it helpful to consider the manner in which issues presented have been addressed by the FCC. *Greater Media, Inc. v. New England Tel. & Tel. Co.*, D.P.U. 91-218, *Order* at 28 (Apr. 17, 1992); *A-R Cable Servs., Inc. v. Mass. Elec. Co.*, D.T.E. 98-52, *Order* (Nov. 6, 1998) at 8. For example, the FCC, "in setting reasonable terms and conditions in pole attachment cases, [considers] the prevailing industry practices." *Mile Hi Cable Partners v. Pub. Serv. Co. of Colo.*, 17 FCC Rcd. 6268, 6271, *Order* (Mar. 28, 2002), ¶ 8 (citing *Adoption of Rules for the Regulation of Cable Television Attachments*, 68 F.C.C.2d 1585, 1590 (1978)). The Department agrees with this reasoning and discusses the prevailing industry practices below.

Surety bond requirements are common in many industries where one party relies on the satisfaction of another party's construction and maintenance obligations. *See, e.g.*, *In re Comprehensive Review of Licensing & Operating Rules for Satellite Servs.*, IB Docket No. 12-267, 30 FCC Rcd. 14,713, FCC 15-167, ¶¶ 25-34 (Dec. 17, 2015) (requiring satellite communications operators to post an application bond as a condition of applying and to maintain an additional, surety bond post-licensing). Indeed, both federal and Massachusetts law require a variety of parties to maintain surety bonds to protect other entities from the risk of those parties' non-performance. *See, e.g.*, 47 C.F.R. § 1.1412(c)(5) (requiring contractors conducting pole attachment work to be adequately insured or maintain a performance bond); G.L. c. 166A, § 5(k) (requiring cable operators to maintain a bond to the licensing authority to compensate the

authority for any damages incurred by the operator's construction and to ensure the operator's removal of its equipment, if required); G.L. c. 100A, § 2 (requiring motor vehicle repair shops and motor vehicle glass repair shops to post a $10,000 bond); G.L. c. 101, § 3 (requiring transient vendor applicants to secure a $500 bond). Similarly, pole owners in other states routinely require attachers to maintain a surety bond, and regulators routinely uphold such requirements. *See, e.g., In re Better T.V., Inc., of Dutchess County, N.Y. v. N.Y. Tel. Co.*, 31 F.C.C.2d 984 (July 27, 1970) (approving conduit use agreement requiring cable lessees to post bond equal to five years' worth of lease payments); *Complaint of Dominion Telecom, Inc. Against Consolidated Edison Co. of N.Y., Inc. Concerning Pole Attachments & the Use of Ducts, Conduits & Rights-of-Way,* N.Y. Pub. Serv. Comm'n Case 02-M-1072, *Order Determining Complaint of Dominion Telecom, Inc. & Instituting Proceeding* (May 21, 2003) (rejecting a challenge to the terms and conditions of a conduit agreement that required attacher to maintain surety bond equal to ten years of lease payments); *In re Application of Mich. Power Co. for Authority to Make Effective its Proposed Pole Attachment Tariff,* Mich. Pub. Serv. Comm'n Case No. U-8149, 1986 WL 1268778 (Mich. P.S.C.) at 15 (May 20, 1986) (approving pole attachment agreements requiring attachers to maintain surety bonds); *Application of Pacific Bell Tel. Co. d/b/a SBC Cal. for Expedited Dispute Resolution of a Right-of-Way Agreement with Roseville Tel. Co. Pursuant to 47 U.S.C. § 224(c) & Decision 98-10-058*, 2005 WL 396088 (Cal. P.U.C.), *Opinion Adopting Final Arbitrator's Report* (Feb. 10, 2005) (approving pole attachment agreement requiring attachers to maintain a bond to ensure performance of attachers' obligations, including attachment removal).

Indeed, Complainant acknowledges the need for Respondents to require surety bonds of commercial attachers. Reply at 2, 5. Complainant simply argues that municipal attachers pose

so small a risk of liability to Respondents as to make this term and condition of the Pole Attachment Agreements not just and reasonable. *Id.* at 5. Regardless of any differences between municipal attachers and commercial attachers, Complainant has failed to produce evidence that Respondents face no risk of loss from Complainant's potential failure to satisfy its obligations contained in the Pole Attachment Agreements and, therefore, that the surety bond requirements are not just and reasonable.

Complainant has not shown that Respondents face no risk from Complainant's failure to remove its equipment from Respondents' poles. Complainant admits the possibility that it may become insolvent, but argues that even if it failed to remove its attachments as the Pole Attachment Agreements require, Respondents would choose not to remove the equipment or, if they did remove the equipment, Respondents could recover the cost of such removal from Complainant. *See* Complaint at 2-3; Reply at 1, 3-4. But Respondents correctly point out that even if they were to determine that there was not a need to remove Complainant's equipment immediately in the event Complainant failed to do so—a point none of the Respondents concede—eventually, as a result of changing technology, physical depreciation, or otherwise, Respondents would have to remove the equipment. Verizon Response at 8-9; Eversource response at 2. Removal would be necessary for multiple reasons, including: 1) to avoid interference with pole owners' work to maintain or move their poles or to add or move other attachments on the poles, 2) to avoid Complainant's equipment falling or otherwise damaging Respondents' poles and equipment or that of other attachers, and 3) to avoid injuring persons or damaging property below. *See* Verizon Response at 9. In addition, regardless of any claimed relative ease of collecting debts from municipalities or commercial attachers, Respondents correctly note that one of the risks the surety bond protects against is the time and cost of debt

recovery. *Id.* at 8. In other words, even if Respondents could be guaranteed that Complainant would always have sufficient capital from which to obtain recovery, as Complainant claims, the process of that recovery would still require some level of time, effort, and most importantly cost, which the bond would cover. In short, the Department agrees with the DPU that Complainant has not shown that its municipal status renders the Respondents free from risk as to Complainant's failure to remove its equipment from Respondents' poles. *See* DPU Comments at 7.

Further, even if Complainant had shown that Respondents faced no risk from Complainant's failure to remove its equipment from Respondents' poles, the surety bonds protect Respondents from several other risks of loss as well. In the Verizon Contract, for example, Complainant assumed the obligation to pay Verizon: 1) attachment fees and charges (Verizon Contract at Section 3.1.1 and Appendix I), including possible late fees (*Id.* at Section 3.4.1); 2) the cost of rearranging or transferring its attachments if Verizon performs such work (*Id.* at Section 7.1.6); 3) a share of the cost of any emergency tree trimming (*Id.* at Section 7.1.10); 4) the cost of any emergency attachment rearrangement or removal (*Id.* at Section 7.1.12); the cost of any Verizon inspections (*Id.* at Sections 8.1 and 8.2); 5) the cost of any Verizon repairs post-inspection (*Id.* at Section 8.3 and 8.4); 6) five times the annual attachment fee for any attachments Verizon did not approve (*Id.* at Section 9.1 and 9.2); 7) all fees and charges due for a given attachment from the date of any termination of the Verizon Contract until the date that Complainant removes its attachment (*Id.* at Section 10.2); and 8) the cost of indemnifying Verizon for "any and all claims, demands, causes of action and costs, including reasonable attorney's fees, for damages to the property of the other party and other persons...etc." (*Id.* at Sections 13.4 through 13.7). The surety bond the Verizon Contract requires

Complainant to maintain must be payable to Verizon for the reimbursement of any of these costs. *Id.* at 18. Complainant's surety bonds maintained pursuant to the Eversource Contract and the National Grid Contract also both cover the costs of Complainant's obligations beyond simply attachment removal. Eversource Contract at 19; National Grid Contract at 3. Thus, although Complainant focuses on the issue of equipment removal, the surety bonds protect Respondents from several other risks that are evident regardless of Complainant's municipal status. Complainant has failed to address these risks and their impact on the reasonableness of the surety bond requirements.

For the above reasons, the Department finds that Complainant has failed to demonstrate that the requirement to maintain surety bonds is not just and reasonable because of Complainant's municipal status or otherwise.

b. Claim that the Amounts of the Surety Bonds Required by the Pole Attachment Agreements Are Not Just and Reasonable

In addition to alleging that the surety bond requirements themselves are not just and reasonable, Complainant also challenged the amount of the surety bonds the Respondents require.[4] Reply at 4, 5; *see also* DPU Comments at 7 (suggesting Department assessment of this issue). Specifically, Complainant argues that the Respondents are over-indemnified by the required surety bonds and, therefore, that the terms and conditions of the Pole Attachment Agreements requiring these surety bonds are unjust and unreasonable. *Id.* Complainant does not allege that the amount of the surety bond in any one of the Pole Attachment Agreements exceeds

[4] Unless the context clearly indicates otherwise, portions of the Department's discussion in this section apply to the related issues of the amount of coverage each surety bond provides and the cost to the Complainant of maintaining each surety bond. As to the latter issue, the Department notes that the record does not answer the question of whether joint pole owners, prior to entering into pole attachment agreements, contractually determine their respective responsibilities for attachment removal. In any event, the question of whether they do, or could, predetermine such responsibilities is not currently before the Department.

the cost of removing Complainant's attachments. *Id.* Instead, Complainant points out that all of the poles covered by the Pole Attachment Agreements are jointly owned by Verizon and one of the other two Respondents. *Id.* Consequently, Complainant argues, the sum of the maximum potential claims of the Respondents to the surety bonds is approximately twice the amount that Complainant estimates it would cost to remove its attachments. *Id.* There are several problems with this reasoning.

First, as evidence for its removal estimate, Complainant provides only an estimated dollar amount that Complainant claims to have obtained from Collins Electric, which an Internet search reveals to be a Massachusetts electrical contractor. Reply at 5 n.1; *see also* Collins Electric, https://www.collinselectricco.com/. Complainant has not met its burden of establishing this estimate. Massachusetts law requires any such estimate be accompanied by an affidavit; this estimate was not. 220 C.M.R. § 45.04(4). Moreover, there is no evidence that this contractor has ever seen any of Complainant's attachments or the poles to which they are attached, let alone that this estimate was specific to Complainant and such attachments and poles. This estimate is unreliable.

Second, even if Complainant's removal estimate were reliable and correct, Complainant has failed to present the information necessary to show that the surety bond requirements are not just and reasonable merely because their combined amounts are higher than the estimate. *See* 220 C.M.R. § 45.04(2)(c). Without knowing the terms of the two surety bonds Complainant holds in connection with a given pole, it is impossible to know whether those two surety bonds would operate to over-indemnify the pole's joint owners. It is a well-established principle that a surety bond's obligation must be read and enforced according to its terms. *C&I Steel, LLC v. Travelers Cas. & Sur. Co. of Am.*, 70 Mass. App. Ct. 653, 657 (2007) (citing *Peerless Ins. Co. v.*

S. Boston Storage & Warehouse, Inc., 397 Mass. 325, 327 (1986)). But Complainant has not provided copies nor cited the relevant provisions of the surety bonds it maintains pursuant to either the Verizon or the Eversource Contract. And since every pole to which the Complainant has attached pursuant to the Pole Attachment Agreements is owned by either one or both of Verizon and Eversource, it is not possible to determine whether the Pole Attachment Agreements over-indemnify either joint pole owner in the event Complainant failed to remove its attachments from a jointly owned pole.

In fact, the terms of the one surety bond for which Complainant did provide some evidence—that held pursuant to the National Grid Contract—suggest that the Pole Attachment Agreements would not over-indemnify any of the Respondents for any of the covered poles. The National Grid Contract includes a form of the surety bond it required. Complaint at 4, "Appendix: National Grid, Surety Bond Excerpt." National Grid required a surety bond that "shall remain in full force and effect as to attachments authorized under said agreement prior to the effective date of cancellation or expiration date until all of said attachments shall have been removed and as to any other obligations or responsibilities accrued prior to said cancellation date or said expiration date." *Id.* The language suggests two ways in which the surety bonds that Complainant maintains pursuant to the Pole Attachment Agreements do not over-indemnify the Respondents.

First, based on this language, if Complainant failed to remove an attachment from a covered pole jointly owned by National Grid and Verizon, and either Verizon or the surety removed the Complainant's attachments, the National Grid surety bond would no longer be in effect and National Grid would receive no payment from the surety. If the Verizon or Eversource surety bonds have similar terms, the Respondents would be made whole, and nothing

more, in the event Complainant failed to remove its attachments. This is because after either the surety or one of the joint owners completed such removal, both joint owners would then jointly own a pole without attachments and without either receiving compensation from the surety beyond any costs incurred in removing the attachment.

Second, Complainant's argument assumes that the cost of removing Complainant's attachments are the only potential costs to the Respondents that the surety bonds cover. In fact, the language of the National Grid Contract and the National Grid surety bond cited above, in conjunction with the terms and conditions of the Pole Attachment Agreements, make clear that the surety bonds cover many potential costs to Respondents beyond the removal of Complainant's attachments. *See* Complaint at 4, "Appendix: National Grid, Surety Bond Excerpt"; *supra* pp. 14-15. Indeed, the National Grid Contract requires Complainant "to guarantee the payment of *any sums which may become due to Licensor* for fees due hereunder or charges for work performed for the benefit of Licensee under this Agreement, *including the removal of Licensee's Attachments* . . . ." National Grid Contract at Section 3.3 (emphasis added). By stating "including the removal of Licensee's Attachments," the contract makes clear that the surety bond covers other costs. Accordingly, even if Complainant's estimate of removal costs were reliable and correct, it would be insufficient to demonstrate that the amounts of the required surety bonds are unjust and unreasonable. Further, in addition to all of these costs, the surety bonds may indemnify the Respondents for costs related to the operation of the surety bonds themselves, such as any costs the Respondents might incur collecting the surety on the surety bonds.[5]

[5] *See, e.g.*, Joel Lewin and Eric F. Eisenberg, Mass. Practice Series TM, Construction Law, 57 MAPRAC § 15:17 (Nov. 2020 Update) (citing *Travelers Cas. & Sur. Co. of Am., Inc. v. Long Bay Mgmt. Co.*, 58 Mass. App. Ct. 786, 788 (2003) ("The general rule is that a 'surety … is … obligated to arbitrate a dispute with a contractor or developer,

For these reasons, the Complainant has failed to show that the surety bond terms and conditions in the Pole Attachment Agreements are unjust and unreasonable because the sum of the surety bonds' maximum claims exceed the actual cost of the removal of Complainant's attachments.

V. Conclusion

For the reasons set forth above, the Department finds Complainant has not established that the terms and conditions of the Pole Attachment Agreements that Complainant challenges pursuant to G.L. c. 166, § 25A and 220 C.M.R. § 45.04 are not just and reasonable.

if the [surety's] bond incorporates by reference an underlying construction contract that contains an arbitration clause.'")).

VI. Order

Accordingly, after due notice and consideration, it is hereby

ORDERED: That Complainant's petition to find unjust and unreasonable the terms and conditions requiring Complainant to maintain a surety bond, contained in a pole attachment agreement with Verizon New England, Inc., dated January 8, 2018, to be and hereby is DENIED; and it is

FURTHER ORDERED: That Complainant's petition to find unjust and unreasonable the terms and conditions requiring Complainant to maintain a surety bond contained in a pole attachment agreement with Massachusetts Electric Company d/b/a National Grid, dated September 5, 2017, to be and hereby is DENIED; and it is

FURTHER ORDERED: That Complainant's petition to find unjust and unreasonable the terms and conditions requiring Complainant to maintain a surety bond contained in a pole attachment agreement with Western Massachusetts Electric Company, a/k/a Eversource, dated August 1, 2017, to be and hereby is DENIED.

So Ordered,

Karen Charles Peterson
Commissioner

NOTICE OF RIGHT TO APPEAL

Pursuant to G.L. c. 25, § 5, and G.L. c. 166A, § 2, an appeal as to matters of law from any final decision, order or ruling of the Department may be taken to the Supreme Judicial Court for the County of Suffolk by an aggrieved party in interest by the filing of a written petition asking that the Order of the Department be modified or set aside in whole or in part. Such petition for appeal shall be filed with the Secretary of the Department within twenty (20) days after the date of service of the decision, order or ruling of the Department, or within such further time as the Department may allow upon request filed prior to the expiration of the twenty (20) days after the date of service of said decision, order or ruling. Within ten (10) days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court for the County of Suffolk by filing a copy thereof with the Clerk of said Court.